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Supreme Court, U.S.
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No. 04-510

In the Supreme Court of the United States

ANTHONY RICCARDO, PETITIONER,

v.

LARRY RAUSCH, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General
MARY E. WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

*Counsel of Record

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Seventh Circuit's fact-bound holding – that no reasonable jury could find that respondent Lt. Larry Rausch subjectively believed that placing Garcia in petitioner Anthony Riccardo's cell on May 28 posed a substantial risk that Garcia would fulfill his personal fantasies on May 30 by sexually assaulting petitioner – is consistent with *Farmer v. Brennan*, 511 U.S. 825 (1994), and Rule 50 of the Federal Rules of Civil Procedure, in light of evidence that respondent knew that (a) petitioner shook his head when asked if he "had a problem" with Garcia, after initially having said he feared Garcia would effect a retaliatory Latin King "hit"; (b) Garcia had no history of violence; (c) Garcia himself had asked for protection from the Latin Kings; (d) the prison's Placement Office was responsible for reviewing respondent's celling decision the next morning; and (e) petitioner would have multiple opportunities thereafter to object to being celled with Garcia.

2. Whether, irrespective of the merits of the questions presented by the petition, petitioner still would not be entitled to judgment given that (a) petitioner's suit was foreclosed under the Prison Litigation Reform Act due to his failure to file a grievance that alerted prison officials about the (alleged) possibility that respondent could have prevented the assault; and (b) respondent was entitled to qualified immunity.

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BRIEF IN OPPOSITION

After petitioner Anthony Riccardo told Respondent Lt. Larry Rausch that he feared a retaliatory "hit" by the Latin Kings, respondent celled petitioner with Garcia, a Latin King who himself had sought protection from the Latin Kings and had no history of violence. Two days later, Garcia sexually assaulted petitioner to fulfill a personal fantasy. Petitioner filed suit, claiming that respondent violated his Eighth Amendment rights, and a jury found in petitioner's favor. The Seventh Circuit reversed, holding that the evidence was legally insufficient to establish either an objective, significant risk of harm or respondent's subjective knowledge of such a risk.

This case presents no unsettled, important question of federal law and no cognizable split among the circuits. Instead, it concerns only the Seventh Circuit's straightforward application (to the particular facts of petitioner's case) of familiar and well-settled principles governing Eighth Amendment claims and the standard for determining whether evidence is legally sufficient.

Even if petitioner were correct on the merits of the question(s) presented, he still would not be entitled to judgment for two independent reasons. First, the case should have been dismissed due to petitioner's failure to comply with the Prison Litigation Reform Act. Second, respondent was entitled to qualified immunity. For these reasons, this Court should deny the petition.

STATEMENT

A. Before "double celling" inmates in 1997 at Centralia Correctional Center, a segregation lieutenant had to determine as best he could whether the inmates were suitable. Tr. I at 28, 35. At that time, the segregation lieutenant on the evening shift did not have access to the information used to determine

suitability. *Id.* at 36, 42. Respondent knew that a cell transfer during the evening shift would be reviewed for suitability the following morning by Centralia's Placement Office, which was solely responsible for the movement of all inmates and had the final say on cell assignments. Tr. III at 71-72, I at 41. He also knew that inmates may complain about cellmates at any time. Tr. I at 47, III at 81.

Respondent has moved inmates from one cell to another hundreds of times. Tr. III at 68-69. When he received a complaint of a problem with a cellmate, which was common, he routinely would discuss the problem to find out what it was and then make further inquiries to assess the sincerity of a housing refusal. Tr. III at 69-70. An inmate who refused housing was moved to segregation for having committed a disciplinary violation, so the procedure was "a little bit more involved" if the inmate already was in segregation. Tr. III at 75-77. If an investigation revealed that the inmate had no legitimate basis for refusing housing, he would be disciplined. Tr. I at 43-45. If the inmate initially refused housing but then changed his mind, however, respondent would not view him as having refused housing, and the inmate would not be moved. Tr. III at 80.

B. Petitioner was incarcerated in 1996 for stalking his former girlfriend. Tr. I at 58, 62. After receiving a disciplinary "ticket" in April 1997 at Centralia, he was placed in segregation. Tr. I at 62-64. On May 21, petitioner was taken to the receiving cells to await a cell assignment in the general population, but while he was there, some of his personal property was stolen. *Id.* He suspected his segregation cellmate, a member of the Latin Kings, who refused to return the property and then threatened petitioner for saying he would report the theft. *Id.* at 65-67. Petitioner subsequently reported the theft to a guard and then refused to be returned to the general population because he wanted to get away from the Latin Kings

after the other inmates saw him make the report. *Id.* at 67-68. Petitioner also filed a grievance about the stolen property. Pl. Ex. 6.

During the day shift on May 28, another inmate introduced petitioner to Juan Garcia, a Latin King who was said to be able to help petitioner recover his property. Tr. I at 69-70. Upon returning from the yard, petitioner told Lt. Alemond that Garcia was going to try to get into his cell and he did not want Garcia there. *Id.* at 72. When petitioner said he feared for his life, Lt. Alemond replied that he would take care of it. *Id.*

At some time before the evening of May 28, petitioner's cellmate refused to be housed with him and was moved. *Id.* at 29.

Respondent was the lieutenant in charge of the segregation and receiving units on the evening shift that day. *Id.* at 26. Petitioner did not mention Garcia to respondent. Tr. II at 30.

At around 9:25 p.m. that evening, respondent came to petitioner's cell with Garcia, who was being placed in enemy protection because he claimed to have enemies among the Latin Kings. Tr. I at 73-74, III at 55, 57. Petitioner agreed to respondent's request to help Garcia bring his property into the cell. Tr. I. at 74. Outside the cell in the day room, petitioner pulled respondent aside and said that Garcia was a Latin King, explaining that he feared for his life due to retaliation by the Latin Kings. Tr. I at 74-75, II at 30, 35. Respondent replied that petitioner had no right to refuse housing while in segregation and that there was no room to move him anywhere else. Tr. II at 30-31.

Respondent then took petitioner back to the cell and asked Garcia if he had a problem with petitioner. Tr. I at 75-76. Garcia said no. *Id.* When respondent asked petitioner if he had

a problem with Garcia, petitioner shook his head and said nothing. *Id.*

Respondent did not see petitioner again, and at trial, he did not recall taking Garcia to petitioner's cell. Tr. III at 68, 72.

C. Over the next two days, May 29 and May 30, Garcia was acting crazy and threatening petitioner, but petitioner did not leave the cell when the door was opened for meal deliveries and removals, and he did not inform the prison staff who came by his cell each day that he did not want Garcia there.[1] Tr. II at 35-36, 40. On May 29, Garcia said he would get the Latin King "hit" removed and try to recover some of petitioner's stolen property if petitioner paid Garcia's telephone bill. Tr. I at 77, Pl. Ex. 8. The next morning, petitioner wrote two grievances, neither of which said he feared Garcia. Def. Ex. 13A, 13B. One was about health care, and the other identified the Latin Kings who had taken his property and complained about the lack of assistance in getting it back. *Id.*

The afternoon of May 30, petitioner accepted Garcia's offer to cut his hair with a razor even though Garcia was "talking crazy . . . about his brother dying and all this other stuff, and how he had these fantasies . . . ." Tr. I at 80-81, II at 45-46. After ripping a chunk of hair from the center of petitioner's head, Garcia began to shave petitioner's head. Tr. I at 81. A correctional officer came by the cell and asked repeatedly if petitioner needed to go to the health care unit because he was "bleeding pretty bad." Tr. I at 81-82, II at 46-47. When petitioner replied, "whatever you think, Officer," the correctional officer left. Tr. I at 82, II at 47.

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[1] In segregation, correctional staff come around mainly to remove trash and deliver three meals, opening the cell doors and placing the trays into each inmate's hands. Tr. II 35, 47, 33. In addition, on each shift, medical staff tour the area. Tr. I at 47.

After dinner trays were removed, Garcia again talked about his brother and how he had to "fulfill this fantasy." Tr. II at 49. After petitioner refused to have anal sex, Garcia ejaculated onto petitioner's feet. Tr. I at 83-84. Garcia then had petitioner perform fellatio, though Garcia did not ejaculate. Tr. I at 84, III at 54. When a correctional officer came by about fifteen minutes later to ask if either inmate wanted ice, petitioner ran out of the cell. Tr. I at 84, II at 52.

Approximately nine months later, in February 1998, petitioner filed a grievance, describing Garcia's attack and stating "I blame myself for this, since the Administration don't do there jobs. This should never happen again. . . . My family and I wish to prosecute to the fullest. . . . If someone outside decided to rape a person they would've broken the law and [been] brought in front of a judge. . . . The law should still be upholded regardless of where [a violation] takes place." Def. Ex. 20. As the "Relief Requested," petitioner asked that "this anima . . . face a judge and jury" and complained that the discipline Garcia had been given for the assault was "not enough." *Id.* The grievance did not mention the guards generally or respondent in particular. *Id.* At trial, petitioner testified that the grievance had nothing to do with respondent putting Garcia in the cell and that its sole purpose was to have criminal charges filed against Garcia. Tr. III at 65-66.

D. Approximately two years after the incident, petitioner filed a complaint alleging that respondent had violated his Eighth Amendment rights. Doc. 1. Respondent moved to dismiss the complaint for failure to timely exhaust his administrative remedies under the Prison Litigation Reform Act (42 U.S.C. § 1997e(a)). Doc. 7. The district court denied the motion due to the lack of evidence that prison officials had taken any action on the grievance. Pet. App. 54. Respondent answered the complaint, raising the defense of qualified immunity. Doc. 26. The matter proceeded to trial, and the jury

returned a verdict for petitioner, awarding him $1,500,000 in compensatory damages. Doc. 53. Respondent filed a motion for judgment as a matter of law or, alternatively, a new trial (Docs. 56, 58), which was denied (Pet. App. 30). Respondent appealed. Doc. 65.

E. The Seventh Circuit reversed, with a dissent. 359 F.3d 510 (7th Cir. 2004). Upon denying respondent's petition for rehearing and suggestions for rehearing en banc, from which four judges dissented, the court issued an amended opinion. Pet. App. 1.

In the amended opinion, the court first held that petitioner had satisfied the PLRA. Pet. App. 2-4. Characterizing the grievance as "ambiguous" and "at the border of intelligibility," and finding it "hard to imagine much less that a prisoner could do and still alert the prison" to the nature of the wrong for which petitioner was seeking redress, the court nevertheless held that the grievance was sufficient for PLRA purposes. *Ibid.* The court viewed it as "hint[ing] at problems in prison administration," which therefore "should have considered" it a request to reduce sexual assaults in general, either by taking better steps beforehand to separate potential victims from potential aggressors or by imposing harsher penalties afterward as a deterrence method. *Ibid.* According to the court, "[a] generous construction of this grievance would have induced the prison to consider the possibility that the guards could have prevented this assault." *Ibid.*

Turning to the merits, the court observed that the objective and subjective components of an Eighth Amendment claim (a "substantial risk of serious harm" and a defendant's appreciation of the existence of that risk, respectively) "are for the jury in the first instance, with appellate review limited to the question whether any reasonable juror could have found that the requisite level of risk existed, and that Rausch knew it." Pet. App. 7. Stressing that under *Farmer v. Brennan*, 511 U.S. 825, 837

(1994), "'deliberate indifference' means substantial awareness," it observed that guards need not believe every prisoner's every statement. Pet. App. 6. As the court reasoned, guards have the difficult task of discriminating, within a short period of time and with little hard information, between feigned or imagined risks of harm and real ones. *Ibid.* The court stressed that guards may not be held liable even if they were negligent. *Ibid.* Instead, quoting *Farmer*, the court emphasized that the guard must be "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ibid.*

The court did not reach the issue of qualified immunity, holding that the evidence was legally insufficient. Pet. App. 7. In doing so, it held that the district court's finding that a guard cannot benefit from immunity if he did not reasonably respond to a risk actually foreseen, which "merged immunity and the merits," was incompatible with *Saucier v. Katz*, 533 U.S. 194, 203-06 (2001). Pet. App. 7.

The court then concluded that, as a matter of law, petitioner had presented insufficient evidence to support a finding on the objective element of his Eighth Amendment claim, that is, a substantial risk of the retaliatory Latin King "hit" petitioner told respondent he feared from Garcia. Pet. App. 7-8. It found significant that petitioner had presented no evidence connecting his fear of a Latin King retaliatory "hit" to the sexual assault, pointing to the evidence that Garcia was acting to fulfill a personal fantasy when he sexually assaulted petitioner and the lack of evidence that Garcia was acting for the Latin Kings. Pet. App. 8. On this record, the court held, "the (objectively evaluated) risk to [petitioner] of sharing a cell with Garcia was no greater than the risk of sharing a cell with any other prisoner." *Ibid.* In doing so, the court likened respondent to a bus company that knowingly hires a driver with a bad drinking record who later has an accident unrelated to his drinking,

explaining that the company could not be held liable because its negligence in hiring the driver did not create or increase the risk of that particular accident. *Ibid.*

On the subjective element of petitioner's claim, *i.e.*, deliberate indifference, the court held that from the evidence at trial, no reasonable jury could have concluded that respondent subjectively appreciated that celling Garcia with petitioner would expose him to a substantial risk of serious harm. Pet. App. 8-12. The court rejected petitioner's argument that respondent "should have believed"petitioner's initial assertion of mortal fear, stressing that *Farmer* requires evidence of what a defendant "*did* believe." *Id.* at 8-9 (emphasis in original). Emphasizing that the Eighth Amendment does not require guards to believe everything an inmate says, the court held that respondent's conduct was a reasonable response under the circumstances because he knew (1) petitioner contradicted his initial statement by denying he "had a problem" with Garcia; (2) Garcia himself had requested protection from the Latin Kings; (3) Garcia had no known history of violence (sexual or otherwise); and (4) the Placement Office would review Garcia's celling assignment the next morning. *Id.* at 9-10. The court further held that on this record, petitioner was entitled to believe that his celling decision would be reviewed the next morning by the Placement Office, and that petitioner could voice his objection to Garcia's presence the next day if he were truly in mortal fear. *Id.* at 10-11.

The court then allayed concerns about how an inmate can demonstrate the objective and subjective prongs of an Eighth Amendment claim when, as here, his attacker has a "clean" record. Pet. App. 10-11. As an example of evidence showing an actual, objective risk of harm, the court stated, an inmate could present evidence of a strong correlation between prisoners' professions of fear and actual violence, such as data about how many requests for protection are dishonored and, if

so, how often this results in violence. Pet. App. 10. The court added that to demonstrate that a guard "must" understand the risk an inmate faces when a protest is disregarded, an inmate may present evidence that violence was common at his prison and that inmates had good track records in identifying potential aggressors. *Ibid.*

In closing, the court stressed that *Farmer* allows guards to exercise independent judgment and make honest mistakes, cautioning that the Eighth Amendment does not require a guard to assume that an inmate's report of potential harm is both honest and accurate. Pet. App. 12.

Judge Williams agreed with the majority that petitioner had satisfied the PLRA, but she dissented on the merits, on the ground that the record contained ample evidence to sustain the verdict. Pet. App. 12-21. She also wrote a dissent from the denial of rehearing en banc, joined by Judges Ripple, Rovner, and Wood. Pet. App. 27-29. Judge Ripple too dissented from the denial of rehearing en banc, joined by Judges Rovner, Wood, and Williams, on the ground that the evidence in favor of petitioner was not legally insufficient. Pet. App. 22-27.

REASONS FOR DENYING THE PETITION

Even if there were an inter-circuit conflict concerning the evidence required to establish the subjective component of an Eighth Amendment "failure to protect" case (and there is none), at least two other independent grounds exist for affirming the judgment against petitioner. As a threshold matter, this case should have been dismissed long before trial because petitioner's grievance failed to comply with the PLRA by containing enough information to alert prison officials that he wanted them to consider whether respondent could have prevented the assault. Another reason for affirmance is that respondent was entitled to qualified immunity in light of the existing case law and the disagreement among the judges of the

Seventh Circuit on denial of rehearing en banc about whether respondent was deliberately indifferent. Thus, because reversal on the questions presented would not affect the judgment, the Seventh Circuit's opinion presents an exceptionally poor candidate for this Court's review.

Even if the merits of the questions presented by petitioner are considered, they do not warrant this Court's attention. Rather than presenting an important federal question on which a conflict exists, petitioner misinterprets and overstates the Seventh Circuit's opinion and his authorities. The Seventh Circuit's decision breaks no new ground. It held only that the evidence presented at trial was legally insufficient on both the objective and subjective components of petitioner's Eighth Amendment claim. Though petitioner contends that this Court's review is warranted because the Seventh Circuit defined "deliberate indifference" in a way that conflicts with *Farmer* and other circuits and applied the wrong standard to respondent's Rule 50 motion, he is mistaken.

On the latter point, the opinion explicitly and repeatedly acknowledged the well-settled principles that courts reviewing jury verdicts must view the evidence in the light most favorable to the non-movant, that both the objective and subjective elements of an Eighth Amendment claim are for the jury to decide in the first instance, and that appellate review is limited to the legal sufficiency of the evidence. Pet. App. 4, 7, 9, 12. Thus, petitioner is just plain wrong in arguing that the Seventh Circuit "evaluated and weighed the evidence on its own . . . ." Pet. 12. Indeed, under petitioner's view, every certiorari petition seeking review of a decision granting a Rule 50 motion should be granted. Here, the court merely did what every court does on appeal from a jury verdict (or summary judgment) – it determined the legal sufficiency of the evidence. The opinion creates no split among the circuits on this point.

The opinion also creates no split on how to prove "deliberate indifference." The court's holding that the Eighth Amendment does not require a guard to accept at face value a prisoner's claim of potential harm is fully consistent with decisions by other circuits and *Farmer*'s holding that a guard cannot be held liable for even an unsound belief that a risk is inconsequential. Moreover, contrary to petitioner's reading of the Seventh Circuit's opinion, it does not require statistical data to demonstrate deliberate indifference. Instead, it merely suggests that such evidence is another way to show both an objectively serious risk and a guard's actual knowledge of that risk, as *Farmer* itself suggested in the hypothetical. Lastly, no case stands for the proposition that a guard who was asked for protection against retaliation can be held liable for a non-retaliatory attack.

In sum, the petition fails to satisfy any of this Court's criteria for a grant of certiorari. It poses no important question of law, and it creates no circuit split. At bottom, petitioner merely contends that the Seventh Circuit misapplied settled law to the particular facts of this case. Certiorari should be denied.

ARGUMENT

I. The Seventh Circuit's Fact-Specific, Record-Bound Opinion Breaks No New Ground, and Creates No Inter-Circuit Conflict, Concerning the Evidence for Demonstrating Deliberate Indifference in Eighth Amendment Cases.

Citing three points from the Seventh Circuit's opinion, Petitioner asserts that this Court's review is needed due to "a conflict among the circuits and uncertainty as to what [evidence] is sufficient to meet both [the objective and subjective components of deliberate indifference] under *Farmer v. Brennan*." He is wrong on all counts.

A. The Seventh Circuit's Opinion Is Fully Consistent with *Farmer* and Creates No Cognizable Split on the Deliberate Indifference Standard.

Petitioner contends that the Seventh Circuit's opinion departs from *Farmer* and conflicts with other circuits' holdings about the evidence an inmate must present to establish the subjective component of an Eighth Amendment claim. Pet. 13-20. His argument, however, completely ignores *Farmer*'s hypothetical example of the evidence an inmate could present to demonstrate deliberate indifference, a hypothetical the Seventh Circuit's opinion reflects. Moreover, even a cursory look at the few cases he cites reveals that they do not conflict with the Seventh Circuit's opinion here.

In *Farmer*, this Court cautioned that the Eighth Amendment is not always implicated when one inmate injures another. 511 U.S. at 833. Instead, it warned, the Eighth Amendment comes into play only when a prison official "*gratuitously* allow[s] the beating or rape of one prisoner by another . . . ." *Id.* at 834 (emphasis added). Accordingly, a failure-to-protect claim succeeds only if supported by evidence of both a substantial risk of serious harm (the objective component) *and* the defendant prison official's "sufficiently culpable state of mind" (the subjective component), that is, "deliberate indifference" to that objective risk.[2] *Ibid.*

This Court then observed that the term "deliberate indifference" reflects a state of mind "more blameworthy than negligence" but "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will

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[2] Like one of the dissenters, petitioner mistakenly describes deliberate indifference, the subjective element of an Eighth Amendment claim, as having an objective component. *See* Pet. 14 (citing Pet. App. 27).

result." *Id.* at 835 (internal quotation marks omitted). Rejecting the objective test for recklessness used in civil cases, under which the risk of harm is either known or so obvious that it "should be known," this Court equated "deliberate indifference" with the familiar objective test used for criminal recklessness. *Id.* at 836-37. Accordingly, it held that a prison official may not be held liable absent evidence that he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, *and* he must also draw the inference." *Id.* at 837 (emphasis added). This Court added that "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. Accordingly, this Court rejected the argument that a prison official could not be held liable if he was unaware of even an obvious risk, regardless of whether a "reasonable" prison official would have noticed the risk. *Id.* at 842. It also warned that a prison official could not be held liable even if the evidence showed that he knew the underlying facts indicating a sufficiently substantial danger, and thus was aware of a danger, but either "believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent" or responded reasonably to it. *Id.* at 844.

Noting that the prison official's state of mind is "a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence," this Court then offered a hypothetical example of the evidence a prisoner could present to demonstrate deliberate indifference. It explained that a trier of fact could find that a prison official had actual knowledge of a risk if the prisoner presented "evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official

being sued had been exposed to information concerning the risk and thus 'must have known' about it . . . ." *Id.* at 842-43 (internal quotation marks omitted). It also held that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious," though it cautioned that the obviousness of a risk is not conclusive evidence because "people are not always conscious of what reasonable people would be conscious of." *Id.* at 842-43 & n.8 (internal citation and quotation marks omitted). Lastly, this Court held, a prison official could be held liable if the evidence showed he "strongly suspected" a risk existed due to a "high probability of facts," but nevertheless refused to investigate it and thereby verify it. *Id.* at 843 n.8.

1. The Seventh Circuit's Opinion Is Fully Consistent with Other Circuits' Views That a Prisoner's Report of Potential Harm, Standing Alone, Is Insufficient to Impute Actual Knowledge of a Substantial Risk of Serious Harm in Every Case.

Petitioner first contends that the Seventh Circuit's holding that "a prisoner's bare assertion [of potential harm] is not enough to make the guard subjectively aware of a risk" conflicts with rulings by "other Circuits." Pet. 10, 15-16, 20-21. As support, however, he cites just one case, in which the Sixth Circuit upheld the denial of qualified immunity for defendant prison officials on the plaintiff's claim that his son had been murdered by another inmate due to their deliberate indifference. *Id.* at 15-16 (citing *Flint v. Kentucky Dep't of Corrections*, 270 F.3d 340 (6th Cir. 2001)). In *Flint*, however, the Sixth Circuit's painstaking review of the evidence revealed that the record included much, much more than the son's "bare assertion" of potential harm.

Specifically, the plaintiff in *Flint* presented evidence that (1) one month prior to the murder, an investigation into a

disciplinary charge against the deceased inmate revealed that a prison official had filed the charge in retaliation after the deceased reported that the official, the killer, and two other inmates had broken prison rules; (2) as a result, the three rule-breaking inmates lost desirable prison jobs and were banned from the work area; (3) two weeks before the murder, the killer was sent a letter by one of the other rule-breakers, describing the deceased as "at the top of [his] list of things to do"; (4) a week before the murder, the killer was sent another letter by the same rule-breaker, reiterating that he blamed the deceased and adding "I want to kill [the deceased] so bad, I dream about it"; (5) less than a week before the murder, the deceased told the plaintiff he was going to be killed during a telephone call and the plaintiff relayed this to some of the defendants as well as to a state representative, who in turn called another defendant; and (6) the defendants who allowed the killer unsupervised access to the room where he killed the deceased had been informed of the killer's death threat against the deceased. *Id.* at 344-45. The court then held that the deceased's report of rule-breaking by the killer and others, coupled with the falsified disciplinary report and the threatening letters, were sufficient to prove deliberate indifference. *Id.* at 354. Plainly, *Flint* cannot be deemed to conflict with the Seventh Circuit's reasoning here, for the record there (unlike here) contained a plethora of evidence to bolster to the deceased's report of potential harm.

Worse yet, petitioner fails to mention that his argument (*i.e.*, actual knowledge of a substantial risk of serious harm *must* be imputed to a guard who hears an inmate's report of potential harm, no matter how baseless) conflicts with the view of at least two federal reviewing courts, who have stated that "'threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of a substantial risk of harm.'" *Jackson v. Everett*, 140 F.3d 1149, 1152 (8th Cir. 1998) (quoting *Prater v. Dahm*, 89 F.3d 538, 541 (8th Cir. 1996)); *see also Varmado-El v. Martin*, 2002 WL

31780947 at *2 (6th Cir. 2002) (unpublished opinion). He also fails to appreciate that his view of deliberate indifference is squarely at odds with *Farmer*: he wants to impose strict liability on any guard who hears any inmate report of potential harm, even if undisputed evidence shows that there was no objective risk or that the guard subjectively believed the risk was insubstantial or nonexistent.

In short, petitioner's argument, if adopted, would eviscerate *Farmer*'s objective and subjective components for an Eighth Amendment claim. Under his rule, no matter how objectively baseless a reported threat might be, a prison official *must* believe and honor it, or he will be deemed deliberately indifferent. Petitioner offers no support for his tacit view that the Eighth Amendment requires all guards to believe all inmates all the time. As the Seventh Circuit correctly held, it does not. There is no circuit split on this point.

2. The Seventh Circuit's Opinion Concerning Whether Statistical Data Are Required to Demonstrate a Defendant's Subjective Knowledge of an Objective, Substantial Risk of Serious Harm Is Fully Consistent With *Farmer* and Other Circuits' Rulings.

Petitioner next implies that the Seventh Circuit *requires* statistical data to prove deliberate indifference, and he argues that this requirement conflicts with *Farmer* and decisions by other circuits that statistics are irrelevant and that circumstantial evidence can be used to prove actual knowledge. Pet. 10-11, 16-18, 20. The Seventh Circuit, however, imposes no such requirement, as evidenced by its recent opinions in *Pierson v. Hartley*, 391 F.3d 898 (7th Cir. 2004) (reversing summary judgment against inmate plaintiff because jury could conclude that defendant was deliberately indifferent based on evidence that defendant assigned attacker with history of violence to unrestricted quarters and then kept him there several months

despite discipline for possessing weapon), and *Velez v. Johnson*, No. 04-1943 (7th Cir. Jan. 13, 2005) (affirming denial of qualified immunity at summary judgment because jury could conclude that defendant was deliberately indifferent based on evidence that after telling defendant he was having conflict with cellmate, plaintiff had pushed emergency call button, which he had no history of abusing, and defendant had been instructed to respond personally to emergencies).

A proper reading of the Seventh Circuit's opinion reveals that the court merely suggested that statistical data are *one* way, not the *only* way, to prove a defendant's actual knowledge (as well as the objective risk) of harm when the attacker had no history of violence. Pet. App. 10. Petitioner overlooks the similarity between the Seventh Circuit's suggestion and this Court's hypothetical in *Farmer* about how circumstantial evidence can demonstrate that a defendant "must have known" of a risk of harm, *i.e.*, by showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past (*and* that the defendant had been exposed to this information). 511 U.S. at 842-43. Thus, the Seventh Circuit's suggestion about using statistical data to demonstrate deliberate indifference comports, not conflicts, with *Farmer*.

Petitioner's three "conflicting" cases demonstrate no inter-circuit conflict. For example, he cites *Smith v. Brenoettsy*, 158 F.3d 908 (5th Cir. 1998), for the proposition that statistics are irrelevant to the deliberate indifference inquiry. Pet. 18. In fact, *Smith* indicates that statistical data *are* relevant, holding that "the number of prisoner complaints [about a subordinate officer] *would appear to cut both ways in determining the reasonableness of a prison official's response*." 158 F.3d at 912 (emphasis added) (rejecting defendant supervising officer's argument that the high number of prisoner complaints alone

made his failure to investigate a reasonable response to plaintiff's complaint about the subordinate).

In *Hamilton v. Leavy*, 117 F.3d 742 (3d Cir. 1997), the court reversed the entry of summary judgment for the defendant prison officials based on evidence that (1) it was undisputed that the plaintiff's safety "ha[d] been an ongoing concern" from 1976 through 1992, based in part on his cooperation with an investigation into drug trafficking by inmates and officials and his resultant reputation as a "snitch"; (2) a unanimous recommendation that the plaintiff be placed in protective custody, which one defendant rejected despite having placed the plaintiff in protective custody on two prior occasions; and (3) the same defendant's knowledge of the plaintiff's cooperation and his later being labeled a "snitch. *Id.* at 744-47. Significantly, the *Hamilton* court characterized the circumstantial evidence before it as "essentially identical to [that] hypothesized by the *Farmer* Court . . . ." *Id.* at 748. Here, of course, petitioner's evidence was not "essentially identical" to the evidence hypothesized in *Farmer*. On the contrary, it was this very defect that the Seventh Circuit found fatal to his case.

Petitioner's citation to *Spruce v. Sargent*, 149 F.3d 783 (8th Cir. 1998), is a curious choice. There, the court *affirmed* judgment as a matter of law for one defendant because (as here) the plaintiff had failed to present sufficient evidence from which a jury could find that she had subjective knowledge of a risk that the plaintiff would be sexually assaulted. *Id.* at 786. The court also held that if a plaintiff presents circumstantial evidence of "very obvious and blatant circumstances indicating that the defendant knew the risk existed," a jury may infer that a defendant "must have known" of the risk. *Ibid.* (internal quotation marks omitted). There, the plaintiff presented both the other defendant's testimony that he knew about that risk of sexual assault in the place at issue and "numerous documents

from the relevant time period containing references to the sexual attacks he was suffering," many of which bore that defendant's signature. *Ibid.* Here, petitioner presented no evidence of "very obvious and blatant circumstances indicating that [respondent] knew the risk existed." Instead, his only bit of evidence was his own alarum to respondent and his subsequent denial of any problem. *Spruce* is obviously inapposite here.

In sum, as demonstrated by its subsequent opinions in *Velez* and *Pierson*, the Seventh Circuit created no new rule requiring statistical evidence to prove deliberate indifference, and its decision created no inter-circuit conflict.

3. The Seventh Circuit's Opinion Concerning Whether the Harm That Occurs Must Be Related to the Potential Harm a Prisoner Asserted Is Fully Consistent With *Farmer* and Other Circuits' Decisions.

Petitioner next contends that the Seventh Circuit held that an inmate must complain about the specific harm that occurred to show deliberate indifference, arguing that this ruling conflicts with several circuit court rulings. Pet. 18-20.

Petitioner completely misinterprets the Seventh Circuit's opinion. As an initial matter, the court was addressing the legal sufficiency of the evidence for the (objective) risk of harm from celling Garcia with petitioner, not the evidence about respondent's (subjective) deliberate indifference. Pet. App. 8. In addition, contrary to petitioner's view (Pet. 18), the court did *not* hold that he failed to show deliberate indifference just because he was sexually assaulted rather than killed. Instead, the court held that Petitioner failed to establish deliberate indifference because he failed to show any connection between the risk of harm he told respondent he feared (a Latin King retaliatory "hit," however effected) and the harm that occurred

(Garcia's sexual assault to fulfill a personal fantasy). As the Seventh Circuit correctly concluded, on this record, Petitioner failed to show that the (objective) risk of placing Garcia in petitioner's cell was any greater than the risk of placing any prisoner there. Pet. App. 8. This view comports with well-established precedent that the Eighth Amendment concerns punishment. *See, e.g., Langston v. Peters*, 100 F.3d 1235, 1238-39 (7th Cir. 1996) (upholding summary judgment against inmate who claimed that defendants were deliberately indifferent to risk of retaliation but failed to provide any evidence that attack was retaliatory). Under petitioner's view, an inmate who tells a guard that he fears his arsonist cellmate will set fire to the cell can succeed on an Eighth Amendment claim even if the arsonist stabs him. Petitioner offers no authority, though, for this novel notion.

None of the three authorities petitioner cites as support on this point conflicts with the Seventh Circuit's reasoning here. For example, he again cites *Smith*, in which the defendant supervisor argued that the plaintiff inmate's letters to him complaining about a guard's verbal abuse were insufficient to make him actually aware that the guard would stab the plaintiff. Pet. 19. Petitioner neglects to mention, however, that the *Smith* court explicitly declined to rule on the sufficiency of this evidence due to lack of jurisdiction. 158 F.3d at 912. *Calderon-Ortiz v. Laboy-Alvarado*, 300 F.3d 60 (1st Cir. 2002), is inapt in a different way. It applied the more lenient requirements for *pleading* an Eighth Amendment claim, such as that a plaintiff may generally aver knowledge, so it deemed legally sufficient the plaintiffs' allegations that the defendants were aware of the prison's inadequate regard for inmates' security needs. *Id.* at 65. Indeed, the First Circuit distinguished *Calderon-Ortiz* on this ground when it upheld the entry of summary judgment for prison officials because the plaintiff had failed to provide evidence of deliberate indifference. *See Burrell v. Hampshire County*, 307 F.3d 1, 9 (1st Cir. 2002).

As for *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), the court merely held that summary judgment was inappropriate given that the plaintiffs had presented (1) the attacking guard's employment record, which contained "a great deal of evidence" concerning his racial discrimination and his propensity to injure inmates by use of force; (2) an internal memorandum to one defendant suggesting that the guard be disciplined before someone was hurt; and (3) sworn statements by the guard's co-workers and supervisors about his conduct and attitude. *Id.* at 508. Not one of these cases turned on whether a defendant prison official knew a particular inmate would be harmed in a certain way, and all of them presented far more evidence of deliberate indifference than is contained in the record here.

In sum, contrary to petitioner's arguments, other circuits have *not* held that an inmate's bare assertion of potential harm is enough to establish deliberate indifference, the Seventh Circuit did *not* create "a new and unprecedented requirement" for statistical data to prove deliberate indifference, and the Seventh Circuit did *not* hold that an inmate must complain about the specific harm that occurred to establish deliberate indifference. Instead, the Seventh Circuit's ruling is a straightforward application of *Farmer* and its progeny to the meager evidence in the record. This Court's review of that ruling is not warranted.

B. The Seventh Circuit's Opinion Is Fully Consistent With This Court's Rule 50 Jurisprudence.

The Seventh Circuit explicitly acknowledged that the subjective and objective components of Eighth Amendment claims are factual questions, and that its review was limited to whether a reasonable jury could have found that respondent actually knew that celling Garcia with petitioner posed a substantial risk of serious harm. Pet. App. 4, 7. Petitioner insists that instead of applying this test and deferring to the jury's factfinding, the court impermissibly reweighed the

evidence. Pet. 20-23. Petitioner fails to appreciate, however, that the legal question presented by respondent's Rule 50 motion was whether petitioner had presented enough evidence to get his case to the jury in the first place. Fed. R. Civ. P. 50. To answer this question, the court had to determine whether the evidence created factual disputes or credibility determinations requiring resolution by a jury as a matter of law. The answer, as the Seventh Circuit correctly held, was no. On this record, a reasonable jury could not find either that an objective risk of harm existed or that respondent subjectively appreciated any such risk of harm.

Contrary to petitioner's implication that the role of a reviewing court when reviewing the denial of a Rule 50 motion is uncertain (Pet. 20-23), this Court explained not long ago that the applicable standard is the same as that for a summary judgment motion. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). This is the very same standard that courts all across the country apply every day, whether on summary judgment, at the close of the evidence before a case goes to the jury, or after a verdict. Ironically, one of petitioner's own authorities demonstrates the fact-intensive nature of this inquiry, which can be decided only case by case, sometimes even defendant by defendant. In *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997), the court upheld the grant of a Rule 50 motion for one defendant prison official because the plaintiff inmate failed to show that this defendant was deliberately indifferent, but it reversed the grant of the motion as to another defendant because the plaintiff met his evidentiary burden as to that defendant.

Moreover, all but one of petitioner's other case law support on this point pre-dates *Reeves*, and some even pre-date *Farmer*. Thus, their continued vitality is questionable. Moreover, though petitioner expresses concern about the application of Rule 50 to deliberate indifference questions, one authority is not

an Eighth Amendment case. None of these cases is helpful anyway, for not one of them conflicts with the standard articulated (and applied) by the Seventh Circuit here.

In *Symons v. Mueller Co.*, 493 F.2d 972 (10th Cir. 1972), a gas explosion case, the court expressed the test as one in which "evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ from the conclusions to be drawn therefrom. . . . [A] directed verdict or judgment n.o.v. may not be granted unless the evidence points one way ans is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Id.* at 976. In *Stubbs v. Dudley*, 849 F.2d 83 (2d Cir. 1988), the court acknowledged differently articulated versions of the Rule 50 standard without finding any conflict among them, and it held that a motion may be granted "if, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Id.* at 85 (internal quotation marks omitted).

Petitioner also asserts that "many other Circuits . . . have stressed the need for great deference to the jury's fact-finding" on the issue of deliberate indifference, implying that a different, and stricter, standard of review should apply after a case goes to the jury. Pet. 23 (citing *Giroux v. Somerset County*, 178 F.3d 28, 34 (1st Cir. 1999) (vacating summary judgment for defendant guard because inmate plaintiff presented evidence that created question of fact as to defendant's deliberate indifference); *Hayes v. New York City Dep't of Corrections*, 84 F.3d 614, 621 (2d Cir. 1996) (holding that the evidence before it created a question of fact for trial concerning the reasonableness of measures defendants took to protect plaintiff from second attack); and *Curry*, 249 F.3d at 508 (holding that summary judgment was inappropriate because plaintiff created question of fact as to supervising defendants' deliberate

indifference with evidence of "vast *number* of complaints and grievances" against attacking guard, which showed a pattern of racial harassment) (emphasis in original)). Not one of these cases stands for the proposition that courts must give "great deference" to the facts a jury has found. Instead, each case merely held that the evidence before it was legally sufficient and thus permitted the case to continue to a trial, at which the jury would engage in fact-finding. Petitioner also fails to appreciate that, as *Reeves* explained, the question a court decides after a jury has reached its verdict is the very same question it must decide at the close of the evidence, before the case is given to the jury for factfinding, as well as on summary judgment: whether the case *should* go to a jury. Likewise, though he questions the role of a reviewing court (Pet. 20, 23), he fails to appreciate that under the *de novo* standard applicable to this question of law, a reviewing court's role is the same as that of the district court.

In short, none of the cases petitioner cites demonstrates an inter-circuit conflict about the role of the reviewing court when reviewing a Rule 50 ruling after a jury verdict. Instead, these cases are in harmony with the standard the Seventh Circuit both articulated and applied in this case.

II. Even If This Court Ruled in Petitioner's Favor on Both Questions Presented in the Petition, the Final Outcome of This Case Would Be No Different.

To grant a petition for a writ of certiorari would be pointless when the judgment will not be affected by a ruling in favor of the petitioner on the questions a petition presents. That is what will happen here, for petitioner cannot overcome two other barriers to the entry of judgment in his favor: the PLRA's requisite for filing suit, and respondent's entitlement to qualified immunity.

Though the Seventh Circuit affirmed the denial of respondent's motion to dismiss for failure to exhaust administrative remedies under the PLRA (Pet. App. 2-4), this case should have been dismissed at the outset. When respondent moved for dismissal for failure to comply with the PLRA's exhaustion requirement (Doc. 7), petitioner responded with a copy of his February 1998 grievance (Doc. 18 at Ex. 2), and the district court denied the motion (Doc. 25 at 2). The Seventh Circuit affirmed, on the ground that the grievance was sufficient to alert prison officials to the nature of the harm for which petitioner filed his suit (Pet. App. 2-4), but a quick review of the grievance itself, along with testimony by petitioner that the Seventh Circuit did not mention, shows otherwise.

The February 1998 grievance gives no indication that it concerned respondent's decision to place Garcia in petitioner's cell. Petitioner did not check off "Staff Conduct" as the subject matter; instead, he checked the box marked "Other." Doc. 18 at Ex. 2. In fact, petitioner himself candidly conceded at trial that the grievance had nothing to do with respondent putting Garcia in his cell and that its sole purpose was to persuade prison officials to have criminal charges brought against Garcia. Tr. III. 65-66. These concessions were fatal to petitioner's case under the PLRA, for his grievance did not (and was not intended to) alert prison officials to the nature of the wrong (petitioner's celling decision) for which petitioner later filed suit. *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). Because petitioner did not comply with the PLRA's precondition for suit, his suit had to be dismissed. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002) (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

Another ground on which the judgment would be affirmed is qualified immunity, an issue the Seventh Circuit did not reach, though it criticized the district court's reasoning when

denying respondent's motion to dismiss on this ground. Pet. App. 7. Qualified immunity shields from suit those who make a decision that, though unconstitutional, "reasonably misapprehends the law governing the circumstances they confronted," which in turn is "judged against the backdrop of the law at the time of the conduct" and "in light of the specific context of the case" rather than as a broad general proposition" or "at a high level of generality." *Brosseau v. Haugen*, 125 S. Ct. 596, 599-600 (2004) (internal quotation marks omitted).

Here, petitioner presented no cases relevant to the situation respondent confronted: whether to accept at face value petitioner's bare assertion that Garcia posed a risk of a retaliatory Latin King "hit" when Garcia too had sought protection from the Latin Kings and had no known record of violence. Moreover, authority to the contrary was issued *after* Garcia's attack. *See, e.g., Luttrell v. Mickel*, 129 F.3d 933 (7th Cir. 1997) (affirming summary judgment against plaintiff inmate who was injured nine days after his request to replace cellmate who heard voices telling him to kill someone); *Jackson v. Everett*, 140 F.3d 1149 (8th Cir. 1998) (rejecting notion that prison official violated Eighth Amendment by doing nothing after questioning threatened inmate in other inmate's presence and being told there was no problem); *Blades v. Schuetzle*, 302 F.3d 801 (8th Cir. 2002) (affirming summary judgment against inmate who had told official he did not fear (and needed no protection from) inmate who later injured him). Were there any doubt that the law is not "clearly established" even today, the dispute among the Seventh Circuit's judges on denial of rehearing en banc in the instant case would dispel them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
GARY FEINERMAN
Solicitor General
MARY E. WELSH*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2106

*Counsel of Record

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